# Tepat Intan Sdn Bhd v Mega First Corp Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2267 OF 2010
CLEMENT SKINNER, MAH WENG KWAI JJCA AND HAMID SULTAN J
28 FEBRUARY 2013

*Civil Procedure — Appeal — Interference by appellate court — Whether decision was perverse — Whether appellate interference warranted*

*Contract — Formation — Concluded contract — Acceptance, communication of — Whether trial judge erred in finding that acceptance had been communicated — Whether specific mode of acceptance had been agreed upon*

The appellant had paid the respondent an earnest deposit of RM700,000 for the purchase of the latter's shares in Rock Chemical Industries (M) Bhd. The respondent claimed that it had communicated its acceptance of the proposal to the appellant but that the appellant had failed to execute the sale and purchase agreement within the specified time. The respondent thus filed an action against the appellant, while the appellant counterclaimed for the return of the deposit it had paid. The trial judge found that the respondent's acceptance had been communicated to the appellant and thus allowed the respondent's claim and dismissed the appellant's counterclaim. This was the appellant's appeal against that decision. In this appeal the appellant submitted that the trial judge had erred in finding that the acceptance had been communicated and had misconstrued the law on communication of acceptance.

**Held**, dismissing the appeal with costs of RM20,000:

(1) It is trite that an offer should be accepted according to its terms and that if a particular mode of communication of acceptance was intended it should be specifically stated so. In the instant case the correspondence between the parties did not suggest any specific mode of communication of acceptance (see para 8(a)).

(2) It is also settled law that what constituted an effective communication would depend on the circumstances of the case. Taking into consideration the factual matrix of the present case, the trial judge had made the finding that the acceptance had been communicated (see para 8(b)).

(3) After a careful examination of the submissions, the judgment and the

evidence it was clear that the trial judge had not misdirected himself as averred by the appellant. The trial judge had directed his mind to the relevant issues, had acted in accordance with the law and his decision passed the acid test of reasonableness. As such, there was no need for appellate intervention (see paras 8(c) & (d)).

**[Bahasa Malaysia summary**

Perayu telah membayar responden deposit cengkeram sebanyak RM700,000 untuk pembelian saham-saham responden dalam Rock Chemical Industries (M) Bhd. Responden mendakwa yang ia memberitahukan penerimaannya terhadap cadangan tersebut kepada perayu tetapi perayu gagal untuk melaksanakan perjanjian jual beli dalam masa yang ditetapkan. Responden oleh itu memfailkan tindakan terhadap perayu, sementara perayu menuntut balas untuk pemulangan deposit yang dibayarnya. Hakim perbicaraan mendapati bahawa penerimaan responden telah diberitahu kepada perayu dengan itu membenarkan tuntutan responden dan menolak tuntutan balas perayu. Ini adalah rayuan perayu terhadap keputusan tersebut. Dalam rayuan ini perayu berhujah bahawa hakim perbicaraan tersilap dalam dapatan bahawa penerimaan telah diberitahu dan telah salah tafsir undang-undang mengenai komunikasi penerimaan.

**Diputuskan**, menolak rayuan dengan kos RM20,000:

(1) Adalah nyata bahawa penawaran patut diterima mengikut kepada termanya dan bahawa jika sesuatu cara komunikasi penerimaan diniatkan ia patut dinyatakan secara spesifik. Dalam kes ini surat menyurat di antara pihak-pihak tidak mencadangkan apa-apa cara komunikasi spesifik penerimaan (lihat perenggan 8(a)).

(2) Adalah juga undang-undang tetap bahawa apa yang membentuk komunikasi efektif akan bergantung atas keadaan kes. Mengambil kira pertimbangan matriks fakta kes ini, hakim perbicaraan telah membuat dapatan bahawa penerimaan telah diberitahu (lihat perenggan 8(b)).

(3) Selepas pemeriksaan teliti penghujahan, penghakiman dan keterangan adalah jeals bahawa hakim perbicaraan tidak salah arah dirinya seperti yang dihujahkan oleh perayu. Hakim perbicaraan telah mengarahkan mindanya kepada isu-isu relevan, telah bertindak mengikut undang-undang dan keputusannya melepasi ujian asid kemunasabahan. Dengan itu, tidak perlu untuk campur tangan mahkamah rayuan (lihat perenggan 8(c) & (d)).]

**Notes**

For cases on concluded contract, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 4643–4662.

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1217–1245.

**Cases referred to**

*Daiman Development Sdn Bhd v Mathew Lui Chin Tech & anor appeal* [1981] 1 MLJ 56, PC (not folld)

*Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* Civil Appeal No J-02(NCVC)(W)-963–05 of 2012 (unreported) (refd)

*Eckhardt Marine Gmbh v Sheriff, High Court of Malaya, Seremban & Ors* [2001] 4 MLJ 49; [2001] 3 CLJ 864, CA (not folld)

*Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713; [1998] 3 CLJ 708, CA (not folld)

*Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650, CA (refd)

*Lefkowitz v Great Minneapolis Surplus Store* (1957) 251 Minn 188 (refd)

*Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of Saw Cheng Chor, the deceased) & Anor* [1997] 1 MLJ 763; [1997] 2 CLJ SUPP 35, HC (not folld)

*Surendra Nath v Kedar Nath* 1936 A Cal 87 (refd)

**Legislation referred to**

Rules of the Court of Appeal 1994 r 18(1)

**Appeal from:** Suit No S5–22–1921 of 2003 (High Court, Kuala Lumpur)

*Mark Ho (Zain Megat & Murad) for the appellant.*
*U Sashiraj (Noorima Fairuz with him) (PC Choong & Co) for the respondent.*

**Hamid Sultan J (delivering judgment of the court):**

**[1]** This is our judgment in respect of the appellant/defendant's counterclaim for return of the deposit. We heard the appeal on 26 November 2012 and dismissed it with costs of RM20,000 to the respondent/plaintiff. My learned brothers Datuk Clement Allan Skinner JCA and Dato' Mah Weng Kwai JCA have read the judgment in draft form and approved the same.

**[2]** It must be noted that the appeal primarily involves a finding of facts by the trial judge, that too physical facts (see *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650 Civil Appeal No B-01–16 of 2010). The learned trial judge has meticulously considered the relevant issues canvassed by the parties inclusive of the appellant/defendant's contention on evidence and had allowed the respondent/plaintiff's claim to forfeit the earnest deposit which was held by the stake holder solicitor and dismissed the appellant/defendant's claim for the return of the deposit. The memorandum of

appeal does not demonstrate that the learned trial judge was plainly wrong and/or the decision was perverse to attract appellate intervention. The lengthy memorandum of appeal which is purely a repetition of one primary issue before the court in the nature of a submission does not subscribe to the spirit and intent of r 18(1) of the Rules of the Court of Appeal 1994 which reads as follows:

> The appellant shall prepare a memorandum of appeal setting forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, and specifying the points of law or fact which are alleged to have been wrongly decided; such grounds to be numbered consecutively.

**[3]** The central allegation of the appellant/defendant before us is that the learned trial judge was wrong in her finding and misconstrued the law on communication of acceptance and accepted the oral evidence of acceptance by failing to consider the correspondence between the parties which states that the respondent/appellant's solicitors will revert their client decision to the appellant/defendant. The appellant/defendant asserts that any other mode of communication will not be valid. And relies on the following cases to drive home the point namely:

(a) *Malayan Flour Mills Bhd v Saw Eng Chee (Administrator of the Estate of Saw Cheng Chor, the deceased) & Anor* [1997] 1 MLJ 763; [1997] 2 CLJ SUPP 35 where the court referred to *Chesire, Fifoot and Firmstone's Law of Contract* (12th Ed), where it was stated:

> In deciding whether there is a concluded contract in a given case the Court will have to examine all the circumstances to see if a party may be assumed to have made a firm offer and if the other may likewise be taken to have accepted that offer a situation often referred to as a meeting of the mind upon a common purpose or consensus ad idem.
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> In as much as an offer must consist of a definite promise to be bound on the terms specified, the acceptance must be communicated to the offerer by 'an external manifestation of assent, some word spoken or act done by the offeree or by his authorized agent which the law can regard as the communication of acceptance to the offeror'.
>
> What constitutes an effective communication of acceptance must necessarily depend on the circumstances of the case. The offeree's intention to accept must be conclusive and he must not treat the negotiation between the parties as still open to the process of bargaining. He must unreservedly assent to the exact terms of offeror. If while purporting to accept the offer as a whole, he introduces a new term which the offeror has not the chance of examining, he is in fact making a counter-offer. The effect of this in the eyes of the law is to destroy the original (see also s 7 of the Contracts Act 1950);

(b) *Eckhardt Marine Gmbh v Sheriff, High Court of Malaya, Seremban & Ors*

[2001] 4 MLJ 49; [2001] 3 CLJ 864 where the Court of Appeal has referred to *Lefkowitz v Great Minneapolis Surplus Store* (1957) 251 Minn 188 where it was stated:

> We are of the view on the facts before us that the offer by the defendant of the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality obligation to constitute a contract of sale.
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> Third, an offer may be made unconditionally or upon stated conditions. In the later case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather elementary propositions, it may be found in *Financings Ltd v Stimson* [1981] 3 All ER 386;

(c) *Daiman Development Sdn Bhd v Mathew Lui Chin Tech & anor appeal* [1981] 1 MLJ 56 where it was stated:

> The question whether parties have entered into contractual relationships with each other essentially depends upon the proper understanding of the expressions they have employed in communicating with each considered against the background of the circumstances in which they have been negotiating, including in those circumstances the provisions of any applicable law. Where they have expressed themselves in wring the proper construction of the writing against that background will answer the question. The purpose of the construction is to determine whether the parties intend presently to be bound to each other or whether, no matter how complete their arrangement might appear to be, they do not so intend until the occurrence of the same further event, including the signature of some further document or the making of some further arrangement. The question is one as to express intention and is not to be answered by the presence or absence of any particular form of words;

and

(d) *Ho Kam Phaw v Fam Sin Nin* [1998] 2 MLJ 713; [1998] 3 CLJ 708 where the Court of Appeal has referred and applied the proposition of law in *Chitty on Contracts* as follows:

> *Method must generally be complied with*. An offer which requires the acceptance to be expressed or communicated in a certain way can generally be accepted only in that way.
>
> Thus if the offeror asks for the acceptance to be sent to a particular place, one sent elsewhere will not bind him *Frank v Knight* (1937) OPD 113; *Eliason v Henshaw* (1819) 4 Wheat 225; *Walker v Glass* [1979] NI 129, nor will he be

bound by an oral acceptance if he has asked for it to be expressed in writing. *Financings Ltd v Stimson* [1962] 1 WLR 1184. This rule is particularly strict where the offer is contained in an option. *Holwell Securities Ltd v Hughes* [1974] 1 WLR 157.

**[4]** In conclusion the learned counsel for the appellant/defendant in support of the appeal asserts that the respondent/plaintiff has failed to discharge the burden to prove that a clear, precise and explicit acceptance without room for negotiation has been communicated to the appellant/defendant.

BRIEF FACTS

**[5]** The facts of the case have been well articulated by the learned trial judge and we do not wish to repeat the same save to summarise as follows:

(a) the appellant/defendant had paid an earnest deposit of RM700,000 to the respondent/plaintiff for the purchase of its shares in Rock Chemical Industries (M) Bhd; and

(b) it was the finding of the learned trial judge as per the issues to be tried that the respondent/plaintiff's acceptance was communicated to the appellant/defendant on 31 May 2003 and the appellant/defendant had failed to execute the sale and purchase agreement within the specified time.

**[6]** The reasoning of the learned trial judge on this issue was crystal clear and there was no issue before the court as to the manner the parties have agreed to communicate the acceptance. If the mode of acceptance is a material issue as canvassed by the learned counsel for the appellant/defendant, it ought to have been in the issues to be tried. After having perused the documents and the factual matrix of case, it is difficult to fathom whether there was a specific mode of acceptance that parties have agreed upon, more so when there was a presence of a middleman who was involved in the deal. It will be useful to quote a short passage of 'Janab's Series To Law, Practice And Legal Remedies' Vol 2 p 6 authored by Hamid Sultan bin Abu Backer on the subject of acceptance which reads as follows:

> The proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto. A proposal when accepted becomes a promise [s 2(b) CA 1950].
>
> General Principles of law of contract is that for acceptance to be valid it must be given by the person to whom the offer is made; the acceptance must be absolute and unqualified; must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted; and the acceptance must be communicated to the proposer by the acceptor [s 7 CA 1950].

The communication of a proposal is complete when the proposal comes to the knowledge of the acceptor. However, in respect of communication of acceptance it is sufficient when it is sent to the proposer notwithstanding that he may not have knowledge of the acceptance [s 3 CA 1950].

A proposal can be revoked at any time before it is accepted and acceptance can be revoked by the acceptor before it reaches the knowledge of the proposer [s 4 CA 1950].

The general principles stated above may vary on different facts, and at times it may be contentious issues which have to be decided by the court.

**[7]** In addition it must be said that the trial judge acknowledged that there were contradictions in the respondent/plaintiff's witnesses evidence but had held that the said contradictions were on immaterial facts with which we are in total agreement. It is also the learned trial judge's finding that there was no challenge on the credit of the respondent/plaintiff's witnesses. In contrast the appellant/defendant's only witness on important issues could not remember the details. Such conduct of the appellant/defendant may prove to be fatal when such issues are contemporary issues and are relevant to the cause of action.

**[8]** We have read the appeal record and the submissions of the parties in detail. It will serve no useful purpose to repeat the said submissions save to deal with core issues. After having given much consideration to the submission of the learned counsel for the appellant/defendant, we take the view that the appeal must be dismissed. Our reasons, inter alia, are as follows:

(a) it is trite that an offer must be accepted according to its terms. If a particular mode of communication of acceptance is intended, it must be specifically stated so. In the instant case, the correspondence does not suggest any specific mode of communication of acceptance. In *Surendra Nath v Kedar Nath* 1936 A Cal 87, a Calcutta case, an offer was made in the following terms: 'I intend to sell my house for Rs7,000. If you are willing to have it, write to F at this address'. Instead of writing to F the purchaser sent an agent in person to F and agreed to purchase the property for Rs 7,000. It was contended that this was not a valid acceptance, as the only manner in which the acceptance of the offer could be made was by writing to F at his address. It was held that the letter had to be read in a reasonable manner and that it did not preclude the purchaser from putting himself into direct communication with F (see *Pollock & Mulla*, (10th Ed), p 103);

(b) in the instant case, it is not in dispute that there was a middle man who was involved in the negotiations as was the case in the above Calcutta case and it was the finding of the learned judge that the acceptance had been communicated. In fact in the Calcutta case the mode of acceptance was

specific. Even the cases relied by the appellant/defendant suggests that what constitutes an effective communication must necessarily depend on the circumstances of the case and we do not see how the cases cited by the appellant/defendant to be of relevance to the appeal or to the appellant/defendant's contention, taking into consideration the factual matrix of the case;

(c) as said earlier the appeal revolves on findings of facts. The memorandum of appeal which was lengthier than the submission filed by the learned counsel for the appellant/defendant does not satisfy the rudimentary requirements to enable the appellate court to intervene in the findings of facts of the trial judge. There is nothing in the memorandum of appeal to suggest with clarity and reasonableness that in fact and law the learned judge was plainly wrong and/or the decision was perverse (see *Damusa Sdn Bhd v MRCB Prasarana Sdn Bhd* Civil Appeal No J-02(NCVC)(W)-963–05 of 2012); and

(d) We have carefully examined the complaints and the judgment and the evidence. We are satisfied that the learned trial judge had not misdirected himself as averred in the memorandum of appeal. In the instant case, we are satisfied that the learned judge had directed his mind to the relevant issues and had acted in accordance with the law and the decision passes the acid test of reasonableness.

**[9]** In conclusion, we find the appeal has no merits and we accordingly dismiss the appeal with costs of RM20,000 to the respondent/plaintiff here and below and order the deposit to be refunded to the appellant/defendant. We hereby order so.

*Appeal dismissed with costs of RM20,000.*

Reported by Kohila Nesan